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IN THE

Supreme Court of the United States

MAHMOUD CHERIF BASSIOUNI
a/k/a M. CHERIF BASSIOUNI,

Petitioner,

v.

CENTRAL INTELLIGENCE AGENCY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a case in which the Central Intelligence Agency (CIA) has admitted to the existence of responsive records and has failed to assert a *Glomar* response, is a circuit court at liberty, in light of the separation of powers doctrine, to exempt the CIA from the requirements of the Freedom of Information Act (FOIA) and the Privacy Act (PA) *in toto* by authorizing the creation of a new "no number, no list" response, which Congress has never sanctioned and for which there is no statutory or regulatory authority, whereby litigants are summarily deprived of the opportunity for any judicial review or meaningful adversarial testing of the propriety of an agency's claimed exemptions upon an agency's invocation of "national security" concerns? The Seventh Circuit's ruling involves an important question of federal law that has not been, but should be, settled by this Court because it directly threatens the continued vitality of FOIA and the PA with respect to any executive agency that claims to be involved in the fight against terrorism.

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Mahmoud Cherif Bassiouni a/k/a M. Cherif Bassiouni, Petitioner, respectfully petitions this Court for a writ of *certiorari* to review the erroneous opinion of the United States Court of Appeals for the Seventh Circuit, Case No. 04-2258, dated December 8, 2004. The circuit court decided an important question of federal law that has not been, but should be, settled by this Court and, in so doing, the circuit court departed from settled principles established by this Court.

OPINIONS BELOW

On December 8, 2004, the United States Court of Appeals for the Seventh Circuit issued its opinion (published at 392 F.3d 244) (Pet. App. at 1a) affirming the district court's ruling (published at 2004 U.S. Dist. LEXIS 5290) (Pet. App. at 9a). The United States Court of Appeals for the Seventh Circuit denied Petitioner's request for rehearing *en banc* on February 1, 2005 (published at 2005 U.S. App. LEXIS 1939) (Pet. App. at 30a).

STATEMENT OF JURISDICTION

The *certiorari* jurisdiction of this Court is invoked in conformity with 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Article I § 1 of the United States Constitution declares: "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ."

Section 552(a)(4)(B) of the Freedom of Information Act (FOIA) provides, in pertinent part, that "[o]n complaint, the

district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B) (2000).

Similarly, section 552a(g)(3)(A) of the Privacy Act (PA) provides that "[i]n any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him." 5 U.S.C. § 552a(g)(3)(A) (2000).

Executive Order No. 12,958 states that, in response to a FOIA or PA request, "an agency may refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified under this order." Exec. Order No. 12,958, § 3.7, 60 Fed. Reg. 19,825, *reprinted as amended in* 50 U.S.C. § 435 (2000).

Likewise, the CIA's implementing regulations for processing requests under both FOIA and the PA provide, in identical language:

> In processing a request, the Agency shall decline to confirm or deny the existence or nonexistence of any responsive records whenever the fact of their existence or nonexistence is itself classified under Executive Order 12958 or revealing of intelligence sources and methods protected pursuant to section 103(c)(5) of the National Security Act of 1947. In such circumstances, the Agency, in the form of a final written response,

> shall so inform the requester and advise of his or her right to an administrative appeal.

32 C.F.R. § 1900.21(c) (2003) (pertaining to FOIA requests); 32 C.F.R. § 1901.21(c) (2003) (pertaining to PA requests).

STATEMENT OF THE CASE

By letter dated November 22, 1999, Professor M. Cherif Bassiouni wrote to the Central Intelligence Agency (CIA) seeking access to records in the agency's possession concerning himself under the Freedom of Information Act (FOIA) and the Privacy Act (PA), which request is the subject of the instant case.[1] The CIA subsequently denied Bassiouni's request and invoked FOIA exemptions (b)(1) and (b)(3) and PA exemptions (j)(1) and (k)(1). On June 6, 2002, after fully exhausting his administrative remedies, Bassiouni filed a complaint for declaratory and injunctive relief pursuant to FOIA, 5 U.S.C. § 552, and the PA, 5 U.S.C. § 552a, for access to documents. After the district court denied as premature Bassiouni's motion to compel production of a *Vaughn* index, the CIA filed a motion for summary judgment. In the declaration filed in support of the CIA's motion, Information Review Officer (IRO) William H. McNair stated that "since the CIA personnel handling plaintiff's 1983 PA request acknowledged the Agency held material on plaintiff at that time, CIA cannot use the Glomar response in 2003." The CIA, however, by means of McNair's Declaration, asserted that it was instead entitled to employ a "no number,

1. In August 1983, Bassiouni submitted a PA request to the CIA for information pertaining to himself. In June 1985, the CIA responded to this request and admitted that it had in its possession responsive material; however, the CIA advised Bassiouni that the material could not be declassified or released in segregable form.

no list" response. In this regard, IRO McNair wrote that "[t]he only practical alternative at this point, to protect classified and otherwise exempt information, is to use the 'no number, no list' response. . . ." On March 30, 2004, the district court issued an opinion in which it granted the CIA's motion for summary judgment, holding that, although the "exact wording" of the "no number, no list" response could not be found in either Executive Order No. 12,958 or the CIA's implementing regulations, the CIA was not barred from employing such a device. (Pet. App. at 22a-23a).

On December 8, 2004, the Seventh Circuit affirmed the judgment of the district court, opining as follows:

> Perhaps it would be best to jettison the distinction between a "*Glomar* response" (refusing to acknowledge whether the CIA has even one responsive document) and a "no number, no list response" (acknowledging that the CIA has at least one responsive document but refusing to elaborate). . . . Because it is the *details* that could tip the agency's hand, they are what matter. From now on, a "*Bassiouni* response" could cover both situations. . . .

(Pet. App. at 6a (emphasis in original)). The panel further suggested that "Bassiouni is better off under a system that permits the CIA to reveal some things . . . without revealing everything. . . ." (Pet. App. at 6a) Moreover, in creating what it styled as the new "*Bassiouni* response," the panel stated that it believed the verbal distinction between the traditional *Glomar* response and the CIA's "no number, no list" response "should be eliminated, lest it confuse or mislead requesters and judges into thinking that something depends on the turn of phrase." (Pet. App. at 6a)

REASONS FOR GRANTING THE PETITION

CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW INVOLVING THE CONTINUED VITALITY OF THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT IN LIGHT OF THE SEVENTH CIRCUIT'S APPROVAL OF A NEW "NO NUMBER, NO LIST" RESPONSE, WHICH CONGRESS HAS NEVER AUTHORIZED AND WHICH PERMITS EXECUTIVE AGENCIES TO NULLIFY A LITIGANT'S RIGHT TO JUDICIAL REVIEW OF AN AGENCY'S CLAIMED EXEMPTIONS UPON AN AGENCY'S BARE ASSERTION THAT "NATIONAL SECURITY" CONCERNS ARE IMPLICATED.

> [I]n times of distress the shield of . . . national security must not be used to protect governmental actions from close scrutiny and accountability.
>
> – *Korematsu v. United States*
> 584 F. Supp. 1406, 1420 (N.D. Cal. 1984)

In the instant case, the Seventh Circuit has authorized the CIA to utilize a so-called "no number, no list" response as a means of preventing disclosure litigants from any adversarial testing of the CIA's claimed exemptions where the agency alleges that the documents at issue could impact "national security" – even in cases, such as herein, where the CIA has determined that a *Glomar* response is not appropriate. The Seventh Circuit's decision effectively exempts the CIA *in toto* from the strictures of FOIA and the PA, and permits the CIA to nullify the well-recognized right of requesters to seek judicial review of an agency's claimed

exemptions through meaningful adversarial testing in the form of a *Vaughn* index.

In addition, in authorizing the creation of this broad-sweeping exemption, which Congress has never enacted, the Seventh Circuit has engaged in judicial lawmaking, which is strictly prohibited by the separation of powers doctrine. Accordingly, this Court should grant the instant petition to clarify the interrelated issues of: (1) whether the CIA may unilaterally exempt itself from FOIA and the PA upon the bare assertion that a case implicates "national security" without affording a plaintiff the opportunity to subject such a claim to any scrutiny; and (2) whether, in sanctioning the CIA's nullification of a plaintiff's statutory right to judicial review, the Seventh Circuit panel violated this Court's oft-quoted pronouncement that courts are prohibited from creating statutory exceptions where Congress has refused to do so.

A. Nullification of Statutory Right to Judicial Review of Claimed Exemptions

When Congress drafted FOIA and the PA, it provided that, on complaint, the district court shall have the jurisdiction to enjoin the agency from withholding agency records and to order their production. *See* 5 U.S.C. § 552(a)(4)(B) (2000); 5 U.S.C. § 552a(g)(1)(B), (3)(A) (2000). The CIA is an "agency" subject to both FOIA and the PA. *See* 5 U.S.C. § 552(f) (2000); 5 U.S.C. § 552a(1) (2000). For more than 30 years now, the propriety of an agency's claimed exemptions has been determined *by the district court* only after the agency first provides the plaintiff with a *Vaughn* index, which consists of a listing of the documents at issue, usually including date, author, and general subject matter,

and a brief explanation of why the agency asserts some classified or otherwise exempted portion of a record (or the entire document) must be redacted or otherwise withheld. *See Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973). It is only by means of the *Vaughn* index that a litigant can have an opportunity to have any meaningful adversarial testing of an agency's claimed exemptions. *See Wiener v. FBI*, 943 F.2d 972, 978 n.5 (9th Cir. 1991) ("The role of the *Vaughn* index in enabling the adversary process to function in FOIA cases is universally recognized."); *see also Becker v. IRS*, 34 F.3d 398, 402 n.11 (7th Cir. 1994) (recognizing that, even with the *Vaughn* index, the requester is placed at a distinct disadvantage because he does not know the specific contents of the document or its redacted portion and may not be familiar with the background facts).

A *Glomar* response,[2] however, may be invoked where an agency claims that "even the confirmation or denial of the existence of records at issue would pose a threat to national security." U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 98-99 (May 2002 ed.) [hereinafter PRIVACY ACT OVERVIEW]. For example, IRO McNair explains in his declaration that "[u]nder normal circumstances, when CIA receives a FOIA or PA request for records on an individual, it provides a 'Glomar response' unless it already has publicly acknowledged a relationship with the individual. That is, CIA refuses to confirm or deny that it holds records pertaining to the individual." In like manner, the Department of Justice points out that the "'neither confirm nor deny' response [is] now known

2. The term "*Glomar*" refers to the *Hughes Glomar Explorer*, a large research vessel that was the subject of the CIA's first litigated efforts to neither confirm nor deny the existence of requested records. *See Phillippi v. CIA*, 546 F.2d 1009, 1010-11 (D.C. Cir. 1976).

as 'Glomar' response or 'Glomarization.'" PRIVACY ACT OVERVIEW, *supra*, at 98-99. Case law similarly supports the understanding that *Glomar* is synonymous with an agency's refusal to "confirm or deny" the existence of responsive records. *See* PRIVACY ACT OVERVIEW, *supra*, at 99 n.63 (collecting cases).

The *Glomar* response is specifically described in section 3.7 of Executive Order No. 12,958, which provides that, in response to a FOIA or PA request, "an agency may refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified under this order." Exec. Order No. 12,958, § 3.7, 60 Fed. Reg. 19,825, *reprinted as amended in* 50 U.S.C. § 435 (2000). Similarly, the CIA's implementing regulations for processing requests under both FOIA and the PA provide, in identical language:

> In processing a request, the Agency shall decline to confirm or deny the existence or nonexistence of any responsive records whenever the fact of their existence or nonexistence is itself classified under Executive Order 12958 or revealing of intelligence sources and methods protected pursuant to section 103(c)(5) of the National Security Act of 1947. In such circumstances, the Agency, in the form of a final written response, shall so inform the requester and advise of his or her right to an administrative appeal.

32 C.F.R. § 1900.21(c) (2003) (pertaining to FOIA requests); 32 C.F.R. § 1901.21(c) (2003) (pertaining to PA requests).

In the present case, however, the CIA admitted that "since the CIA personnel handling plaintiff's 1983 PA request acknowledged the Agency held material on plaintiff at that time, CIA cannot use the Glomar response in 2003." As recognized by IRO McNair, once the CIA revealed that it was maintaining records pertaining to Bassiouni, it could not, by definition, invoke a *Glomar* response.

Yet, rather than following the normal course of disclosure litigation and providing Bassiouni with a *Vaughn* index, the CIA instead attempted to assert an entirely new defense, which it called the "no number, no list" response. In this regard, IRO McNair wrote in his Declaration that "[t]he only practical alternative at this point, to protect classified and otherwise exempt information, is to use the 'no number, no list' response. . . ." There is, however, *no statutory or regulatory provisions* authorizing the use of such a defense. No such exemption can be found anywhere in FOIA or the PA. In fact, prior to the Seventh Circuit's decision, there was not a single reported case in the country that even made mention of this response.

Instead, although conceding that the *Glomar* response and the "no number, no list" response are distinct, the former being where the agency "refus[es] to acknowledge whether the CIA has even one responsive document" and the latter where the agency "acknowledg[es] that the CIA has at least one responsive document but refus[es] to elaborate," the Seventh Circuit stated that "[n]either name has any magic; the statute and the executive order in combination, not the CIA's nomenclature, are dispositive." (Pet. App. at 6a) The panel further opined that the *Glomar* response and the "no number, no list" response "are functionally identical" and recommended that "the verbal distinction should be

eliminated, lest it confuse or mislead requesters and judges into thinking that something depends on the turn of phrase." (Pet. App. at 6a)

Contrary to the panel's assertion, however, the *Glomar* response and the "no number, no list" response are not "functionally identical"; in fact, they are both temporally and functionally distinct. With regard to the timing of the responses, according to CIA implementing regulations, the agency *must* issue a *Glomar* response in connection with processing an administrative request: "In such circumstances, the Agency, in the form of a final written response, shall so inform the requester and advise of his or her right to an administrative appeal." 32 C.F.R. § 1900.21(c) (2003); 32 C.F.R. § 1901.21(c) (2003). On the other hand, a "no number, no list" response could be asserted only after a complaint was filed in federal court. With respect to their divergent goals, the *Glomar* response is designed for the sole purpose of concealing the fact of whether an agency has records on a particular individual or subject. The "no number, no list" response, however, has been created with the express purpose of concealing the amount or nature of the withheld documents from a litigant who is already aware that the agency is in possession of records pertaining to his or her request.

As such, the "no number, no list" response is nothing more than an illegal prophylactic device designed to shield the agency from its responsibilities under *Vaughn* and to subvert a requester's statutory right under FOIA and the PA to test the propriety of the agency's claimed exemptions under the eyes of an impartial judicial arbiter. *See* 5 U.S.C. § 552(a)(4)(B) (2000); 5 U.S.C. § 552a(g)(1)(B), (3)(A) (2000).

Moreover, to permit such a defense to stand would allow a plethora of executive agencies, who were previously subject to judicial review under FOIA and the PA but who now have been assigned various roles in protecting the United States against the threat of terrorism, to exempt themselves from public scrutiny in disclosure litigation by simply uttering the talismanic phrase "national security." In today's climate of oppressive executive secrecy, and in light of recent revelations of serious abuses and ineffectiveness within such agencies, this Court must ensure that the workings of government remain open and that executive agencies remain subject to the legislative constraints wisely incorporated into FOIA and the PA – the most important of which is judicial scrutiny. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring):

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be the last, not first, to give them up.

This Court should accept review to clarify that only Congress may declare a particular agency exempt from the watchful eye of public scrutiny that is the hallmark of FOIA and the PA.

B. Separation of Powers Doctrine Precludes Judicial Lawmaking

The separation of powers doctrine is a preeminent feature of the American constitutional dynamic. *See Mistretta v. United States*, 488 U.S. 361, 380 (1989) (reaffirming "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"); *see also* U.S. CONST. arts. I, II & III. With respect to the power to make laws, the United States Constitution unequivocally states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States. . . ." U.S. CONST. art. I § 1. As Justice Black wrote, "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears, that lay behind their choice." *Youngstown*, 343 U.S. at 589.

In *Freytag v. CIR*, 501 U.S. 868 (1991), this Court declared that courts "are not at liberty to create an exception where Congress has declined to do so." *Freytag*, 501 U.S. at 874 (quoting *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989)). Moreover, as the Seventh Circuit itself has previously cautioned: "Certainly, federal judges must not reach out and grasp at straws in an attempt to rewrite the laws duly enacted by the legislative branch of government, the Congress." *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1271 (7th Cir. 1993). *See Stiffler v. Lutheran Hospital*, 965 F.2d 137, 140 (7th Cir. 1992) ("It is a well-established principle of statutory construction that silence is not an invitation to embark on a path of judicial lawmaking.").

In attempting to justify why the "no number, no list" response should be permitted, the Seventh Circuit panel invoked emotionally charged "national security" shibboleths, hypothesizing that the information contained in the traditional *Vaughn* index sought by Bassiouni could be utilized by enemy nations and "terrorists," *e.g.*: "Any information available to Bassiouni is available to North Korea's secret police and Iran's counterintelligence service, too." (Pet. App. at 3a-4a) The issue in the present case, however, is not whether Bassiouni will ever obtain access to the records at issue but, instead, whether he has the right to have a district judge first review the CIA's claims and determine whether they properly fall within the particular exemptions asserted by the agency. *See Vaughn*, 484 F.2d at 826-28. Otherwise, in the future, agencies will simply invoke "national security" concerns, whether justified or not, and thereby automatically turn disclosure suits into summary proceedings. Furthermore, the Seventh Circuit panel even admitted that, absent its approval of the new "no number, no list" response, Bassiouni would have had a substantial likelihood of success in gaining access to some of the documents in his CIA file: "The agency does not contend that the *contents* of all documents mentioning Bassiouni are classified; it could hardly do so, given not only its refusal to identify which documents it holds but also the certainty that its files contain many U.N. Reports, newspaper clippings, and other non-classified materials." (Pet. App. at 2a (emphasis in original)).

It is a basic principle of statutory construction that "courts have no right first to determine the legislative intent of a statute and then, under the guise of its interpretation, proceed to either add words or eliminate other words from the statute's language." *Water Quality Ass'n v. United States*, 795 F.2d 1303, 1309 (7th Cir. 1986). Similarly, a judge may not

attempt to change the language of a statute "because he thinks Congress may have overlooked something." *Id.* This is precisely what the panel did in Bassiouni's case by sanctioning the creation of the "no number, no list" response and announcing a new "*Bassiouni* response." (Pet. App. at 6a) Here, the CIA did not assert a *Glomar* response. Apparently dissatisfied with the potential outcome in future disclosure cases, the panel attempted to fill a gap in what it perceived as a deficiency in the congressional scheme *vis-a-vis* the potential for disclosure of classified information. Yet, as iterated by this Court, "courts 'are not at liberty to create an exception where Congress has declined to do so.'" *Freytag*, 501 U.S. at 874 (quoting *Hallstrom*, 493 U.S. at 27).

In this regard, if a party wishes to change the law, "the proper forum is the Congress of the United States where all interested parties will be entitled to engage in the full panoply of hearings and arguments before the congressional and senatorial committees" and where Congress will have the opportunity to consider such proposals after due deliberation and reflection. *Welsh*, 993 F.2d at 1271. Just as the CIA may not circumvent the legislative process by unilaterally exempting itself from the strictures of FOIA and the PA, circuit courts are similarly precluded by the separation of powers doctrine from engaging in judicial lawmaking under the rubric of "interpretation." *See Water Quality Ass'n*, 795 F.2d at 1309; *see also Stiffler*, 965 F.2d at 140.

Until Congress says otherwise, the Seventh Circuit lacks the authority to prevent Bassiouni or any other disclosure litigant from his statutory entitlement to have an impartial judicial officer review the propriety of an agency's claimed exemptions before summarily dismissing his case.

Accordingly, this Court should accept review to determine whether, in the instant case, the appellate panel impermissibly trespassed on legislative territory that is reserved exclusively for Congress.

CONCLUSION

For the reasons set forth above, the Petitioner, M. Cherif Bassiouni, respectfully prays that a writ of *certiorari* issue to review the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED DECEMBER 8, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 04-2258

MAHMOUD CHERIF BASSIOUNI,

Plaintiff-Appellant,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 02 C 4049—Charles R. Norgle, Sr., *Judge*

ARGUED OCTOBER 26, 2004—DECIDED DECEMBER 8, 2004

Before POSNER, EASTERBROOK, and SYKES, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Professor M. Cherif Bassiouni, a member of DePaul Law School's faculty since 1964, is the head of DePaul's International Human Rights Law Institute and a frequent participant in human-rights activities sponsored by the United States, the European Union, and the United Nations. In 1983 Bassiouni asked the

Central Intelligence Agency for copies of all documents that mention him. The agency replied that it had some but would not reveal any details. In 1999 Bassiouni tried again, invoking both the Freedom of Information Act and the Privacy Act. Again the agency replied that it has documents bearing his name. Some of these, the CIA stated, had come from the State Department, to which it dispatched copies. The State Department's catalog and partial disclosure of those copies satisfies Bassiouni. But he is dissatisfied with the CIA's refusal to hand over or even describe documents it generated internally or received from sources other than the State Department. The district court concluded that the CIA is entitled to keep mum. 2004 U.S. Dist. LEXIS 5290 (N.D.Ill. Mar. 30, 2004).

Both the FOIA and the Privacy Act contain exceptions for classified information. 5 U.S.C. § 552(b)(1) (FOIA); 5 U.S.C. § 552a(k) (Privacy Act). (Exemption 3, see § 552(b)(3), likewise covers properly classified documents in light of the National Security Act, 50 U.S.C. § 403, see *CIA v. Sims,* 471 U.S. 159 (1985), but we need not discuss it given exemption 1.) The Privacy Act also allows the CIA to exempt by regulation records in its possession. See 5 U.S.C. § 552a(j)(1). The agency has used this authority, see 32 C.F.R. § 1901.62, which leads Bassiouni to direct his fire against the CIA's invocation of exemptions to the FOIA. The agency does not contend that the *contents* of all documents mentioning Bassiouni are classified; it could hardly do so, given not only its refusal to identify which documents it holds but also the certainty that its files contain many U.N. reports, newspaper clippings, and other non-classified materials. Instead the agency maintains that

providing a list of the documents that mention Bassiouni, and claiming document-by-document exemptions for those whose contents are classified, would reveal details about intelligence-gathering methods. These methods are classified independently of the information in materials the CIA collects. See Executive Order 12958 § 1.5(c), (d), 60 Fed.Reg. 19825, 19827 (April 20, 1995). (Since this suit began, E.O. 12958 has been superseded by Executive Order 13292, 68 Fed.Reg. 15315 (Mar. 28, 2003), but the substantive criteria pertinent to Bassiouni's situation are unchanged. See 68 Fed.Reg. 15317.)

It is easy to appreciate the basis of this concern. A list of documents could show clusters of dates that reveal when the agency acquired the information. Knowing which documents entered the files, and when, could permit an astute inference *how* the information came to the CIA's attention—and, in the intelligence business, "how" often means "from whom." A *Vaughn* index (named after *Vaughn v. Rosen,* 484 F.2d 820 (D.C.Cir.1973)) thus could blow an agent's cover. Painstaking analysis of the patterns reflected in the agency's holdings might reveal that the person named in the request is *himself* a source of information. That would not be worrisome if people could request information only about themselves; Bassiouni knows whether he has ever been on the CIA's payroll (or has provided unpaid assistance). But any member of the public may invoke the FOIA, and the agency must disregard the requester's identity. See *Department of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 771 (1989); *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 149 (1975). Thus any information available to Bassiouni is available to North

Korea's secret police and Iran's counterintelligence service too. These and other hostile entities would be greatly interested in learning who is assisting the CIA. Even allies could be unpleasantly surprised by information that discloses espionage operations. And when the dates, numbers, and general subjects of documents (the information required in a *Vaughn* index) would not help anyone learn who supplied the information, it could help them learn how the CIA is deploying its resources and what subjects it is investigating; that knowledge could be useful to both nations and terrorists.

Because lists of documents could assist foreign intelligence services— whose powers of inference and deduction rise with their own stock of information, which helps them to identify patterns that professors, newspaper reporters, and judges may miss—the CIA refuses to reveal its holdings. It does this even when disclosure could be innocuous. There are two risks in disclosing when the request is harmless (as Bassiouni's may well be) and keeping silent when the CIA sees a danger. The first risk is that whoever makes the decision on behalf of the CIA may miss some clue that foreign intelligence services would catch, and thus inadvertently reveal secrets. The second risk is that people would draw an inference from disparate treatment: if, for example, the CIA opens its files most of the time and asserts the state-secrets privilege only when the information concerns a subject under investigation or one of its agents, then the very fact of asserting the exemption reveals that the request has identified a classified subject or source. When a pattern of responses itself reveals classified information, the only way to keep secrets is to maintain silence uniformly. And this is what the CIA has done. Today the agency's silence is

called a "*Glomar* response," taking its name from the *Hughes Glomar Explorer,* a ship built (we now know) to recover a sunken Soviet submarine, but disguised as a private vessel for mining manganese nodules from the ocean floor. See *Phillippi v. CIA,* 546 F.2d 1009 (D.C.Cir.1976). Every appellate court to address the issue has held that the FOIA permits the CIA to make a "*Glomar* response" when it fears that inferences from *Vaughn* indexes or selective disclosure could reveal classified sources or methods of obtaining foreign intelligence. See, e.g., *Frugone v. CIA,* 169 F.3d 772 (D.C.Cir.1999); *Minier v. CIA,* 88 F.3d 796 (9th Cir.1996).

Bassiouni does not take issue with these decisions. Instead he contends that the CIA waived its right to make a *Glomar* response when it revealed that its files contain at least one document bearing his name. Instead of responding to the 1999 request with stony silence, the CIA conceded again that it had some responsive documents and made what it calls a "no number, no list" response, which amounts to the same thing: the requester gets no details. How this can be a "waiver" we do not grasp. See *Sims,* 471 U.S. at 180; *Stein v. Department of Justice,* 662 F.2d 1245, 1259 (7th Cir.1981). The risk to intelligence sources and methods comes from the details that would appear in a *Vaughn* index; it is these details—both the documents that appear in a list and the documents that the CIA might have gathered but did not—that permit crafty observers to infer what the CIA is investigating, what it has overlooked, and how (and from whom) it gleans information. Bassiouni does not contend that the statement "we have some responsive documents" let the cat out of the bag. Both the first response and the second response leave to the imagination whether there is a

cat to let out. The public is as much in the dark about the agency's sources and methods as it ever was. And Bassiouni is better off under a system that permits the CIA to reveal some things (such as the documents routed to the State Department) without revealing everything; if even a smidgen of disclosure required the CIA to open its files, there would be no smidgens. See *Public Citizen v. Department of State*, 11 F.3d 198, 203 (D.C.Cir.1993).

Perhaps it would be best to jettison the distinction between a "*Glomar* response" (refusing to acknowledge whether the CIA has even one responsive document) and a "no number, no list response" (acknowledging that the CIA has at least one responsive document but refusing to elaborate). Neither name has any magic; the statute and the executive order in combination, not the CIA's nomenclature, are dispositive. Because it is the *details* that could tip the agency's hand, they are what matter. From now on, a "Bassiouni response" could cover both situations, which are legally identical. Indeed, unless the CIA is willing to concede that its records system is like a roach motel—papers go in, but they don't come out—disclosure that the agency had some documents identifying a person in Year t does not imply that it still has them in Year t + n. The agency therefore could have made a flat *Glomar* response to Bassiouni's 1999 request. This shows that the *Glomar* response and the no number, no list response are functionally identical and implies that the verbal distinction should be eliminated, lest it confuse or mislead requesters and judges into thinking that something depends on the turn of phrase.

Appendix A

Bassiouni advances a distinct argument under subsection (e)(7) of the Privacy Act, which says that an agency must "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity". 5 U.S.C. § 552a(e)(7). He contends that between 1970 and 1975 the FBI investigated his political beliefs (including his criticism of American foreign policy) and shared with the CIA the results of this investigation. The CIA does not doubt that Bassiouni has made a sufficient preliminary showing that the FBI gathered information about Bassiouni's politics and has not replied that its maintenance of these records (if indeed it *is* maintaining them, which it will not confirm or deny) is authorized by any of the "unless" clauses in subsection (e)(7). It does not follow, however, that Bassiouni is entitled to a *Vaughn* index. Exemption 1 would not mean much if all anyone had to do, to see the full list of the CIA's holdings, was allege that the agency had some documents showing how he "exercises rights guaranteed by the First Amendment". Almost anyone whose activities come to the CIA's attention could make such an assertion.

Subsection (e)(7) says that the agency may not *maintain* records unless it meets certain conditions. It does not say that the agency must *disclose* records to the subject when that step would reveal classified intelligence sources and methods. See 5 U.S.C. § 552a(g)(2), (4); *Irons v. Bell,* 596 F.2d 468, 470 (1st Cir.1979). Bassiouni could have asked the district judge to order the CIA to reveal *in camera* what records (if any) it received from the FBI about Bassiouni

between 1970 and 1975 (and has clung to for 30 years), and either purge them from its files or give a statutory justification for keeping them. Yet Bassiouni has never made such a request—not of the CIA, not in the district court, and not in this court. He wants disclosure rather than erasure, and disclosure is the one thing that he cannot have.

AFFIRMED.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 30, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 02 C 4049

Judge Charles R. Norgle

Mahmoud Cherif Bassiouni,

Plaintiff,

v.

Central Intelligence Agency,

Defendant.

OPINION AND ORDER

CHARLES R. NORGLE, District Judge:

Before the court is Defendant's Motion for Summary Judgment [docket entry 22-1]. For the following reasons, the motion is granted.

Appendix B

I. BACKGROUND

Plaintiff, Mahmoud Cherif Bassiouni ("Bassiouni"), seeks any records that may be in the possession of Defendant, the Central Intelligence Agency ("CIA"), which might pertain to him. The court takes judicial notice that Bassiouni is currently employed as a professor at the DePaul University College of Law, where he is held out by that institution as an expert on human rights, terrorism, international law and Middle East issues. *See* DePaul University website *available at* http://www.law.depaul.edu/faculty_staff/faculty_ information.asp?id=7. His biography purports that "[h]e is one of the world's leading authorities on terrorism and international human rights law and the author of two books on terrorism. Bassiouni was also involved with the first U.S. terrorism study in 1978, and he currently serves as a consultant on terrorism for the U.S. Department of State." DePaul University Experts Guide, *available at* http://sherman.depaul .edu/media/webapp/mrFindIndex2.html.

In August 1983, Bassiouni wrote a letter to the CIA seeking information pertaining to himself pursuant to the Privacy Act. In June 1985, the CIA responded, advising Bassiouni that it possessed responsive material that could not be declassified or released, and additionally, that the CIA would not release information forwarded to it by the Federal Bureau of Investigations or any other governmental agencies.

Fourteen years later, on November 22, 1999, Bassiouni sent a letter to the CIA requesting that it provide him with records pertaining to himself, pursuant to the Freedom of Information Act ("FOIA") and the Privacy Act. In response,

on June 7, 2000, the CIA denied Bassiouni's request, invoking FOIA exemptions 5 U.S.C. § 552(b)(1) and (b)(3) and Privacy Act exemptions 5 U.S.C. § 552a(j)(1) and (k)(1). On July 19, 2000, Bassiouni sent an appeal letter to the CIA and requested reconsideration of the initial denial. On November 17, 2000, the CIA responded to Bassiouni's requested reconsideration and again denied the request, based on the same rationale as indicated in the initial response.

On June 6, 2002, Bassiouni filed the present suit, seeking declaratory and injunctive relief, pursuant to FOIA and the Privacy Act. *See* Pl.'s Compl. ¶ 1 [docket entry 1-1]. Specifically, Bassiouni sought to enjoin the CIA from withholding access to records that pertained to him and to order that such records be produced by the CIA for inspection. *See id.* On July 12, 2002, the CIA answered Bassiouni's complaint. *See* Def.'s Answer [docket entry 7-1]. Shortly thereafter, on August 5, 2002, Bassiouni filed a motion to compel production of a Vaughn index, which the court denied. *See Bassiouni v. CIA,* 248 F.Supp.2d 795 (N.D.Ill.2003).

Approximately one year after the filing of the Complaint, the CIA began providing Bassiouni with records responsive to his request. On May 22, 2003, the CIA referred fifty-two records to the State Department ("State") for direct response. On June 13, 2003, State released thirty-one records in full; thirteen records in redacted form pursuant to FOIA Exemptions 1, 3 and 6; and withheld seven records in full pursuant to FOIA Exemptions 1 and 3. On July 15, 2003, State released the remaining record in redacted form pursuant to FOIA Exemption 1. On July 15, 2003, the CIA referred two additional records to State for direct response, which

State withheld in part pursuant to FOIA Exemptions 1 and 3. The CIA alleges that other records not referred to State, if any, are being withheld pursuant to FOIA Exemptions 1 and 3 and Privacy Act Exemptions (j)(1) and (k)(1).

By agreement of the parties, the thirteen records that were released in part on June 13, 2003 are no longer at issue in this litigation. *See* Def.'s LR 56.1 n. 1. Additionally, Bassiouni has determined not to further pursue access to the ten remaining records withheld in full or in part by State. *See* Pl.'s Mem. In Resp. to Def.'s Mot. for Summ. J., at 1. Thus, all that remains at issue in this case are any other records not referred to State by the CIA, if any, which are being withheld pursuant to FOIA Exemptions 1 and 3 and Privacy Act Exemptions (j)(1) and (k)(1).

On August 8, 2003, the CIA filed a Motion for Summary Judgment, which is fully briefed and before the court. The CIA argues that there is no genuine issue of material fact as to whether it has satisfied its obligations under FOIA and the Privacy Act, and it is entitled to judgment as a matter of law. Bassiouni argues that the CIA is not entitled to summary judgment, because: (1) the CIA has waived its right to withhold any records based on the CIA's 1985 acknowledgment that it possessed responsive material with regard to him; (2) the affidavit proffered in support of the CIA's Motion for Summary Judgment is insufficient; and (3) genuine issues of material fact exist as to whether the CIA possesses records regarding his First Amendment activities.

Appendix B

II. STANDARD OF DECISION

A. Summary Judgment

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden to prove that no genuine issue of material fact exists. *See Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Once the moving party shows that there is no genuine issue of material fact, the burden shifts to the non-moving party to designate specific facts showing that there is a genuine issue for trial. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). The court views the record evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *See* Fed.R.Civ.P. 56(c).

The non-moving party cannot rest on the pleadings alone, but must identify specific facts that raise more than a mere scintilla of evidence to show a genuine triable issue of material fact. *See Murphy v. ITT Technical Services, Inc.*, 176 F.3d 934, 936 (7th Cir.1999); *see also* Fed.R.Civ.P. 56(e). "Conclusory allegations alone cannot defeat a motion for summary judgment." *See Thomas v. Christ Hosp. and Medical Ctr.,* 328 F.3d 890, 893-94 (7th Cir.2003) (citing *Lujan v. Nat'l Wildlife Federation,* 497 U.S. 871, 888-89 (1990)).

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Summary judgment is the procedural vehicle by which most FOIA and Privacy Act claims are resolved. *See, e.g., Misciavige v. IRS,* 2 F.3d 366, 369 (11th Cir.1993). "In a suit brought to compel production of records, an agency is entitled to summary judgment if no material facts are in dispute and if it demonstrates 'that each document that falls within the class requested either has been produced ... or is wholly exempt from FOIA's inspection requirements.'" *Wheeler v. CIA,* 271 F.Supp.2d 132, 136 (D.D.C.2003) (quoting *Students Against Genocide v. Dep't of State,* 257 F.3d 828, 833 (D.C.Cir.2001)).

B. Freedom of Information Act and the Privacy Act

In general, the FOIA envisions a policy favoring disclosure of federal agency records. *See, e.g., CIA v. Sims,* 471 U.S. 166-67 (1985). In general, the primary goal of the Privacy Act "is to allow individuals on whom information is being compiled and retrieved the opportunity to review the information and request that the agency correct any inaccuracies." *Henke v. Dep't of Commerce,* 83 F.3d 1453, 1456 (D.C.Cir.1996). However, the FOIA and the Privacy Act both envision that certain federal agency records should not be subject to public disclosure, and provide statutory exemptions from disclosure. *See* 5 U.S.C. § 552(b) (FOIA); 5 U.S.C. § 552a(j) and (k) (Privacy Act).

At summary judgment, the agency bears the burden of non-disclosure by justifying the exemption claimed, and the court determines *de novo* whether the exemption claimed is appropriate. *See* 5 U.S.C. § 522(a)(4)(B) (FOIA); 5 U.S.C. § 522a(g)(2)(A) (Privacy Act). An agency may meet its

burden by submitting a reasonably detailed affidavit explaining why the requested information falls within the exemption claimed. *See Minier v. CIA,* 88 F.3d 796, 800 (9th Cir.1996). Summary judgment is warranted if the agency's affidavit: (1) describes the justifications for non-disclosure with reasonably specific detail; (2) demonstrates that the information withheld logically falls within the claimed exemptions; and (3) shows that the justifications are not controverted by evidence in the record or by evidence of bad faith on the part of the agency. *See Hunt v. CIA,* 981 F.2d 1116, 1119 (9th Cir.1992). However, in making the determination whether the exemption claimed is appropriate, the court is to accord substantial weight to the agency's affidavits in support of the exemption claimed. *See Hunt,* 981 F.2d at 1119 (citing *Miller v. Casey,* 730 F.2d 773, 776, 778 (D.C.Cir.1984)). The court is to accord substantial weight to the agency's affidavits because the " 'Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic.] might occur as a result of public disclosures of a particular classified record.' " *Military Audit Project v. Casey,* 656 F.2d 724, 738 (D.C.Cir.1981) (quoting S.Rep. No. 93-1200, 93rd Cong., 2nd Sess. 12 (1974) reprinted in 1974 U.S.C.C.A .N. 6267, 6290).

III. ANALYSIS

In this case, the CIA states that its decision to withhold records, if any, not referred to State, is based on FOIA Exemptions 1 and 3 and Privacy Act Exemptions (j)(1) and (k)(1).

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A. FOIA and Privacy Act Exemptions From Disclosure

1. FOIA Exemption 1 and Privacy Act Exemption (k)(1)

FOIA Exemption 1 provides that the FOIA does not apply to matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 522(b)(1); *see also* Executive Order No. 12,958, 60 Fed.Reg. 19,825 (Apr. 17, 1995). Section 1.5(c) of Executive Order No. 12,958 allows classification of information concerning "intelligence activities (including special activities), intelligence sources or methods. . . ." Executive Order No. 12,958, § 1.5(c). Section 1.5(d) of Executive Order No. 12,958 covers information concerning "foreign relations or the foreign activities of the United States, including confidential sources. . . ." Executive Order No. 12,958, § 1.4(d). Pursuant to § 1.2(a)(4) of Executive Order No. 12,958, information in section 1.5(c) and (d) may be classified when "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and the original classification authority is able to identify and describe the damage." Executive Order No. 12,958, § 1.2(a)(4); *see also* Executive Order No. 12,958, § 1.4(c) (delegating classification authority).

Under Exemption (k)(1) of the Privacy Act, the Director of the CIA also has the power to exempt records pertaining

to classified information. *See* 5 U.S.C. § 552a(k)(1). Under the authority of Exemption (k)(1), the Director of the CIA has exempted from disclosure "those portions and only those portions of all systems of records maintained by the CIA that would consist of, pertain to, or otherwise reveal information that is: (a) Classified pursuant to Executive Order 12,958 (or successor or prior Order) and thus subject to the provisions of 5 U.S.C. § 552(b)(1) and 5 U.S.C. § 552a(k)(1). . . ." 32 C.F.R. § 1901.63.

Thus, the inquiry to be made under FOIA Exemption 1 and Privacy Act Exemption (k)(1) is identical. Classified information that has been properly classified as secret is exempt from disclosure pursuant to FOIA Exemption 1 and Privacy Act Exemption (k)(1).

2. FOIA Exemption 3 and Privacy Act Exemption (j)(1)

FOIA Exemption 3 provides that the FOIA does not apply to matters that are "specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 522(b)(3). A two-part inquiry determines whether Exemption 3 applies to a given case.[1] *See Sims,* 471 U.S. at

1. The CIA's Exemption 3 withholdings are based on § 103(c)(7) of the National Security Act, codified at 50 U.S.C. § 403-3(c)(7), which requires the Director of Central Intelligence to "protect (Cont'd)

167. First, the court must determine whether the claimed statutory exemption is a withholding statute within the scope of Exemption 3. *See id.* Second, the court must determine whether the requested information falls within the scope of the statute. *See id.*

Under Exemption (j)(1) of the Privacy Act, the Director of the CIA can lawfully exempt records pertaining to intelligence sources and methods from the access provisions of the Privacy Act. *See* 5 U.S.C. § 552a(j)(1). Under the authority of Exemption (j)(1), the Director of the CIA has exempted from disclosure "those portions of all systems of records maintained by the CIA that: (1) Consist of, pertain to, or would otherwise reveal intelligence source or methods. . . ." 32 C.F.R. § 1901.62.

Thus, the inquiry to be made under FOIA Exemption 3 and Privacy Act Exemption (j)(1) is identical. Information that would reveal intelligence source and methods is exempt from disclosure pursuant to FOIA Exemption 3 and Privacy Act Exemption (j)(1).

(Cont'd)

intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403- 3(c)(7). As for the first part of the inquiry, § 103(c)(7) of the National Security Act is a withholding statute within the scope of Exemption 3. *See Assassination Archives & Research Ctr. v. CIA,* 334 F.3d 55, 58 (D.C.Cir.2003) (citing *Sims,* 471 U.S. at 178-79). As for the second part of the inquiry, the CIA has provided the declaration of William McNair, as discussed *infra,* which explains that the information being withheld concerns intelligence sources and methods and falls within the scope of § 103(c)(7) of the National Security Act. *See* Def.'s Mot. for Summ. J.; McNair Decl. ¶ 25.

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B. CIA's Response to Bassiouni's FOIA and Privacy Act Request

William H. McNair, Information Review Officer for the Directorate of Operations of the Central Intelligence Agency, has submitted a detailed affidavit in support of the CIA's Motion for Summary Judgment (hereinafter "McNair Declaration."). *See* Def.'s Mot. for Summ. J.; McNair Decl. The McNair Declaration states that he holds authority, pursuant to Executive Order 12,958, to conduct classifications reviews, as well as to make classification and declassification decisions. The McNair Declaration explains the CIA's justification in response to Bassiouni's FIOA and Privacy Act request.

The McNair Declaration states:

> This case is one in which the CIA would normally use a Glomar response—neither confirming nor denying it holds documents on plaintiff. However, since the CIA personnel handling plaintiff's 1983 Privacy Act request acknowledged the Agency held material on plaintiff at that time, CIA cannot use the Glomar response in 2003. The only practical alternative at this point, to protect classified and otherwise exempt information, is to use the 'no number, no list' response, as explained below.

McNair Decl. ¶ 9.

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Bassiouni raises three arguments in response to the CIA's Motion for Summary Judgment. First, whether the CIA has waived the right to assert a "no number, no list" response to Bassiouni's FOIA and Privacy Act request. Second, whether the McNair Declaration is sufficient to justify the CIA's response to Bassiouni's FOIA and Privacy Act request. Third, whether summary judgment may be granted in light of Bassiouni's allegation that the CIA possesses information concerning his First Amendment activities.

1. Waiver of the Right to Assert a "No Number, No List" Response

Bassiouni argues that the CIA has waived its right to withhold any records based on the CIA's 1985 acknowledgment that it possessed responsive material with regard to him. Furthermore, Bassiouni contends that the CIA's assertion of a "no number, no list" response is not supported by relevant authority, either case law or statutory via the CIA's implementing regulations. Bassiouni argues that the CIA's implementing regulations, 32 C.F.R. § 1900.21(c) (FOIA) and 32 C.F.R. § 1901.21(c) (Privacy Act) only provide for a Glomar Response, and not a "no number, no list" response. In essence, Bassiouni contends that the CIA's "no number, no list" response is simply a Glomar response, which the CIA conceded that they could not use.

Due to the CIA's 1985 acknowledgment that it possessed responsive records concerning Bassiouni, it states that a complete Glomar Response was precluded. *See* McNair Decl. ¶ 9. Since a complete Glomar Response was precluded, the CIA referred fifty-four records to State for direct response,

while declining to confirm or deny the existence of any other records by means of what the CIA refers to as a "no number, no list" response, in order to protect classified and otherwise exempt information. According to the CIA, any further inventory of other records not referred to State by the CIA, if any, would jeopardize its interests in protecting the existence or nature of intelligence activities, and are being withheld pursuant to FOIA Exemptions 1 and 3 and Privacy Act Exemptions (j)(1) and (k)(1).

With regard to Bassiouni's waiver argument, an agency may waive its claim that information is exempt from disclosure if the plaintiff in a FOIA case carries his burden of pointing to an official disclosure of specific information in the public domain that appears to duplicate that being withheld. *See Afshar v. Dep't of State,* 702 F.2d 1125, 1130 (D.C.Cir.1983). A plaintiff must satisfy three criteria in order to establish that an agency has waived its claim that information is exempt from disclosure: (1) the information requested must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must have been made public through an official and public disclosure. *See Fitzgibbon v. CIA,* 911 F.2d 755, 765 (D.C.Cir.1990) (citing *Afshar,* 702 F.2d at 1130).

The court rejects the argument that the CIA has waived its right to claim FOIA or Privacy Act Exemptions in response to Bassiouni's FOIA and Privacy Act request. While the CIA acknowledged that it possessed responsive material concerning Bassiouni in 1985, Bassiouni fails to point to specific information in the public domain that appears to

duplicate that allegedly being withheld in 2003. Bassiouni simply argues the general concept of waiver without citing to case law dealing with waiver in the context of a FOIA or Privacy Act case. Furthermore, in this case, Bassiouni is relying on the CIA's 1985 acknowledgment to indicate waiver in 2003, some fourteen years later. However in *Afshar,* the court noted that prior disclosures should not operate as waiver as to information pertaining to a later period in time. *See Afshar,* 702 F.2d at 1133. In the realm of intelligence, a lot can occur in a short period of time and certainly more can occur in a decade. In short, Bassiouni has not carried his burden of proving that the CIA has waived its right to claim FOIA or Privacy Act Exemptions in response to Bassiouni's FOIA and Privacy Act request. *See Afshar,* 702 F.2d at 1130.

The court also rejects the argument that a "no number, no list" response is not supported by relevant authority. A Glomar Response is of no consequence absent the CIA's ability to rely on a specific FOIA Exemption to justify such a response. *See Minier,* 88 F.3d at 800; *see also Hunt,* 981 F.2d at 1118 (stating that the CIA's right to assert a Glomar Response depends on whether the declarations proffered in support of such a response support exemption under applicable FOIA Exemptions). Likewise, a "no number, no list" response is of no consequence absent the CIA's ability to rely on a specific FOIA Exemption to justify such a response. The court is not inclined to become fixated with labels or parse semantics.

Pursuant to § 3.7(a) of Executive Order No. 12,958, in response to a FOIA or Privacy Act request, a federal agency may "refuse to confirm or deny the existence or nonexistence

of requested information whenever the fact of its existence or nonexistence is itself classified under this order." Executive Order No. 12,958, § 3.7(a). The CIA's regulations implement this portion of Executive Order 12,958, stating: "[t]he Agency shall decline to confirm or deny the existence or nonexistence of any responsive records whenever the fact of their existence or nonexistence is itself classified under Executive Order 12,958. . . ." 32 C.F.R. § 1900.21(c) (FOIA); 32 C.F.R. § 1901.21(c) (Privacy Act). Neither Executive Order No. 12,958 nor the CIA's implementing regulations make reference to a Glomar Response or a "no number, no list" response. Thus, the fact that the exact wording of either response is not found in those authorities is of no consequence. The CIA's ability to refuse to confirm or deny the existence of responsive records, by use of a Glomar Response or a "no number, no list" response, is based on the statutory exemptions that exempt certain federal agency records from public disclosure. *See* 5 U.S.C. § 552(b) (FOIA); 5 U.S.C. § 552a(j) and (k) (Privacy Act). So long as the affidavits in support of the statutory exemption claimed justify the CIA's non-disclosure, it has complied with the relevant authority.

In this case, the McNair Declaration states that "[t]he only practical alternative at this point, to protect classified and otherwise exempt information, is to use the 'no number, no list' response. . . ." *See* McNair Decl. ¶ 9. Furthermore, the McNair Declaration states that the CIA utilizes "Glomar Responses," "Split Glomar Responses," and "no number, no list" responses in response to FOIA requests. *See id.* ¶¶ 8-9. The court must accord substantial deference to the agency's interpretation of its own regulations, according the well-

known *Chevron* standard. *See Barnhart v. Wilson*, 535 U.S. 212, 213 (2003); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

The court finds that the CIA has not waived the right to assert a "no number, no list" response to Bassiouni's FOIA and Privacy Act request, and that such a response was appropriate.

2. Sufficiency of the McNair Declaration

Thus, having found that the CIA's "no number, no list" response to Bassiouni's FOIA and Privacy Act request was appropriate, the court must determine whether the affidavit in support of the statutory exemptions claimed justify the agency's response in this case.

According to the McNair Declaration:

> Assuming CIA still holds responsive documents, providing a portion of the withheld responsive documents, or even a list or number of such responsive documents, would expose sensitive and classified methods and would reveal the extent of the U.S. collection efforts, analysis and reporting directed at particular targets. It could further reveal the relative priority that the CIA attached to a particular intelligence subject and indicate where the Agency had allocated its limited resources. This could reveal U.S. policy interests and expose strengths and gaps in the

> Agency's intelligence gathering ability. It would reveal information that could damage U.S. foreign relations.

McNair Decl. ¶ 15.

In support of the use of the "no number, no list" response, the McNair Declaration describes the justifications for non-disclosure pursuant to FOIA Exemptions 1 and 3 and Privacy Exemptions (j)(1) and (k)(1) with reasonably specific detail and demonstrates that the information withheld logically falls within those claimed exemptions. The McNair Declaration provides a well-reasoned, specific and plausible basis for concluding that those statutory exemptions preclude further identification of records responsive to Bassiouni's request due to the detrimental effects of disclosure on intelligence methods, interests, sources and capabilities, as well as detrimental effects on United States foreign relations. *See Minier,* 88 F.3d at 800; *Hunt,* 981 F.2d at 1119. As such, the McNair Declaration is entitled to substantial weight from the court, as the " 'Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects [sic.] might occur as a result of public disclosures of a particular classified record.' " *Casey,* 656 F.2d at 738 (quoting S.Rep. No. 93-1200, 93rd Cong., 2nd Sess. 12 (1974) reprinted in 1974 U.S.C.C.A.N. 6267, 6290). The court is also mindful of the United States Supreme Court's admonition in *Sims,* where the Court stated:

> The decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the

> magnitude of the national security interests and potential risks at stake. It is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency.

Sims, 471 U.S. at 179.

In enacting the FOIA and the Privacy Act, and the statutory exemptions thereto, Congress recognized that "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *Id.* at 180. Under our system of checks and balances, Congress also has oversight authority of the CIA's activities, whereas the courts and FOIA and Privacy Act requestors do not.

The court finds that the McNair Declaration is sufficient to justify the CIA's response to Bassiouni's request on the basis that records not referred to State, if any, are exempt from disclosure pursuant to FOIA Exemptions 1 and 3 and Privacy Act Exemptions (j)(1) and (k)(1).

3. Bassiouni's allegation that the CIA possesses information concerning his First Amendment activities

Lastly, Bassiouni argues that summary judgment may not be granted in light of his allegation that the CIA possesses information concerning his First Amendment activities. In

his memorandum in opposition to the CIA's Motion for Summary Judgment, Bassiouni states: "the [CIA] has collected and is maintaining records that describe his First Amendment activities." Pl.'s Mem. in Resp. to Def.'s Mot. for Summ. J., at 8 (citing Pl.'s Aff. ¶¶ 8-11, 31, 38). Bassiouni contends that this assertion, alone, creates a genuine issue of material facts precluding summary judgment, because the Privacy Act provides that no agency shall maintain no record describing how any individual exercises rights guaranteed by the First Amendment. *See* 5 U.S.C. § 552a(e)(7).

In response, the CIA argues that this argument has been raised for the first time in Bassiouni's memorandum in opposition to summary judgment, was not raised in his Complaint, and thus, a belated effort to raise such a claim must be rejected. The CIA further argues that, assuming *arguendo,* that Bassiouni were granted leave to file an amended complaint (which he has not done), such a claim would have to be dismissed to give full effect to the CIA's legitimate exemptions from disclosure. *See* Def.'s Reply Mem. in Supp. of Def.'s Mot. for Summ. J., at 10-11 (citing *Nolan v. Dep't of Justice,* 973 F.2d 843 (10th Cir.1992); *Wentz v. Dep't of Justice,* 772 F.2d 335 (7th Cir.1985)).

A plaintiff cannot create a genuine issue of material fact, thereby precluding summary judgment, by raising facts for the first time in response to defendant's motion for summary judgment which were not raised in the complaint. *See Bass v. Hendrix,* 931 F.Supp. 523, 538 (S.D.Tex.1996) (stating that a plaintiff cannot defeat a defendant's entitlement to summary judgment by raising an argument for the first time in response to the motion for summary judgment); *Kansas*

Mun. Gas Agency v. Vesta Energy Co., 840 F.Supp. 814, 821-22 (D.Kan.1993) ("A party cannot wait until a summary judgment motion is filed against a theory advanced by it and, realizing the lack of merit in its position, suddenly shift to a wholly new and different one, particularly where, as here, that theory is the plaintiff's very own contention as to how it was allegedly damaged."); *see also Schroeder v. Copley Newspaper,* 879 F.2d 266, 270 n. 2 (7th Cir.1989) (stating that arguments raised for the first time in a reply brief are waived). Likewise, a plaintiff cannot amend his or her complaint through allegations made for the first time in response to defendant's motion for summary judgment. *See Shanahan v. City of Chicago,* 82 F.3d 776, 781 (7th Cir.1996) (stating that a "plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment").

Bassiouni's Complaint sought declaratory and injunctive relief, pursuant to FOIA and the Privacy Act. *See* Pl.'s Compl. ¶ 1 [docket entry 1-1]. Specifically, Bassiouni alleged the CIA was improperly withholding records that pertained to him. *See id.* ¶¶ 1, 11. The Complaint did not allege the CIA was improperly maintaining records that pertained to Bassiouni's First Amendment Activities.

The present Motion for Summary Judgment tests the allegations of the Complaint as framed, which is devoid of any allegation that the CIA was improperly maintaining records that pertained to Bassiouni's First Amendment Activities. As such, the attempt to create a genuine issue of material fact precluding summary judgment by raising facts in briefs to the summary judgment motion not raised by the

complaint must be rejected. Additionally, Bassiouni has not sought leave to file an amended complaint to add such a claim, and that issue is not before the court.

The court finds that summary judgment may be granted in light of Bassiouni's allegation that the CIA possesses information concerning his First Amendment activities, because that allegation was not raised in his Complaint nor has he sought leave to add such a claim.

III. CONCLUSION

For the forgoing reasons, the Defendant's Motion for Summary Judgment is granted.

IT IS SO ORDERED.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED FEBRUARY 1, 2005

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

February 1, 2005

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DIANE S. SYKES, Circuit Judge

No. 02 C 4049
Charles R. Norgle, Sr., *Judge.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 04-2258

Mahmoud Cherif Bassiouni,

Plaintiff-Appellant,

v.

Central Intelligence Agency,

Defendant-Appellee.

Appendix C

Order

Plaintiff-appellant filed a petition for rehearing and rehearing en banc on January 21, 2005. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Chief Judge Flaum and Judges Rovner and Wood took no part in the consideration or decision of this case.